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## VIA ECF

May 30, 2008

Chief Judge Gregory M. Sleet  
United States District Court  
844 King Street, Room 4324  
Wilmington, DE 19801

Re: Brimonidine Patent Litigation  
USDC-D. Del. - C.A. No. 07-md-1866-GMS



ATLANTA

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DALLAS

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SAN DIEGO

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TWIN CITIES

WASHINGTON, DC

Dear Chief Judge Sleet:

While no Scheduling Order has been entered by the Court, by agreement the parties have been conducting themselves pursuant to the dates set forth in the proposed Scheduling Order (D.I. 28) submitted on April 2, 2008. That proposed Order requires opening Markman briefs to be filed on June 2, 2008. By agreement, the parties would like to move that date to June 3, 2008. The changing of this one date will have no effect on the other proposed dates in the order. The proposed order also sets forth the Court's new limits on the page lengths for opening, responsive, and reply briefs.

Respectfully submitted,

*/s/ William J. Marsden, Jr.*

William J. Marsden, Jr.

WJM:jrm  
Attachment  
cc: All counsel of record (via email)

80061350.doc

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

IN RE:

BRIMONIDINE PATENT LITIGATION

C.A. No. 1:07-md-1866-GMS

**REVISED SCHEDULING ORDER**

This \_\_\_\_\_ day of \_\_\_\_\_ 2008, the Court having conducted a Rule 16 Scheduling Conference pursuant to Local Rule 16.2(b) on February 8, 2008; and at that conference the Court, among other things, instructed the Plaintiff to identify the claims it is asserting against the California Defendants by March 26, 2008, and by that same date, the California Defendants were to inform the Plaintiff whether the California Defendants agreed to venue in Delaware; the Plaintiff and the California Defendants having exchanged the above information before the Court's follow-up conference call on March 26, 2008; and because the parties having determined after discussion that the matter cannot be resolved at this juncture by settlement, voluntary mediation, or binding arbitration;

IT IS ORDERED that:

1. **Rule 26(a) Initial Disclosures.** Unless otherwise agreed, the parties shall make their initial disclosures pursuant to Federal Rule of Civil Procedure 26(a) on or before February 22, 2008.
2. **Joinder of other Parties and Amendment of Pleadings.** All motions to join other parties and amend the pleadings shall be filed on or before February 29, 2008.

3. **Markman Claim Construction Hearing.** A *Markman* claim construction hearing shall be held on July 16, 2008 at 9:30 a.m. On or before April 11, 2008, Plaintiff shall serve on Defendants its claim chart. On or before April 25, 2008, Defendants shall serve on Plaintiff their claim charts. The claim charts shall include citations to intrinsic evidence supporting the parties' proposed claim construction. The parties shall meet and confer regarding narrowing and reducing the number of claim construction issues on or before May 9, 2008. On or before May 16, 2008, the parties shall submit a Final Joint Claim Chart, which shall include citations to intrinsic evidence. The Plaintiff shall submit to the court, a Joint Appendix of Intrinsic and Extrinsic Evidence (the "Joint Appendix") containing all intrinsic and extrinsic evidence relied upon in the claim construction briefing. A sample table of contents of the Joint Appendix can be located on this Court's website at [www.ded.uscourts.gov](http://www.ded.uscourts.gov). The Joint Appendix shall be filed on the same day as the answering claim construction briefs. The parties shall file opening claim construction briefs on June 3, 2008, and answering claim construction briefs on June 16, 2008. The opening and responsive claim construction briefs shall not exceed twenty (20) pages.

4. **Discovery**

a. **Discovery Schedule and Limitations:** Fact discovery in this case shall be initiated so that it will be completed on or before August 29, 2008 and Expert discovery shall be completed on or before November 21, 2008. Opening expert reports by the party with the burden of proof on an issue shall be exchanged on September 5, 2008. Responsive expert reports shall be exchanged on September 26, 2008. Rebuttal expert reports shall be exchanged on October 17, 2008. The Defendants will share 5 interrogatories to be jointly propounded on Plaintiff. The California Defendants and Delaware Defendants may separately propound 20 interrogatories per group. There shall be no limit to the number of requests for admission.

Plaintiff is entitled to 75 hours of deposition time for use with the California Defendants and an additional 75 hours of deposition time for use with the Delaware Defendants. The Defendants shall share 130 hours of deposition time for use with Plaintiff. Nothing in this Order shall preclude a party from seeking leave of Court for additional discovery beyond these limits.

b. **Discovery and Scheduling Matters:** Should counsel find they are unable to resolve a discovery or scheduling matter, the party seeking the relief shall contact chambers at (302) 573-6470 to schedule a telephone conference. Not less than forty-eight hours prior to the teleconference, the parties shall file with the court, via electronic means (CM/ECF), **a joint, nonargumentative** letter agenda not to exceed two (2) pages outlining the issue(s) in dispute. A sample letter can be located on this Court's website at [www.ded.uscourts.gov](http://www.ded.uscourts.gov). After the parties have had three (3) discovery teleconferences, they will be required to file a joint letter showing good cause why the Court should permit a fourth discovery teleconference. Should the Court find further briefing necessary upon conclusion of the telephone conference, unless otherwise directed, the party seeking relief shall file with the court a **TWO-PAGE LETTER**, exclusive of exhibits, describing the issues in contention. The responding party shall file within five (5) days from the date of service of the opening letter an answering letter of no more than **TWO PAGES**. The party seeking relief may then file a reply letter of no more than **TWO PAGES** within three (3) days from the date of service of the answering letter.

5. **Confidential Information and Papers filed under Seal.** Should counsel find it will be necessary to apply to the Court for a protective order specifying terms and conditions for the disclosure of confidential information, they should confer and attempt to reach an agreement on a proposed form of order and submit it to the Court within ten (10) days from the date of this order. When filing papers under seal, counsel should deliver to the Clerk an original and two

copies of the papers.

**If after making a diligent effort the parties are unable to agree on the contents of the joint proposed protective order, then they shall follow the dispute resolution process outlined in paragraph 4(b).**

6. **Summary Judgment Motions.** Prior to filing any summary judgment motion, the parties must submit letter briefs seeking permission to file the motion. The opening letter brief shall be no longer than five (5) pages and shall be filed with the Court no later than September 12, 2008. Answering letter briefs shall be no longer than five (5) pages and filed with the Court no later than September 19, 2008. Reply letter briefs shall be no longer than three (3) pages and filed with the Court on or before September 22, 2008. The Court shall hold a Status Conference to hear argument and to determine whether the filing of any motion for summary judgment will be permitted on October 2, 2008. **Unless the Court directs otherwise, no letter requests to file a motion for summary judgment may be filed at a time before the dates set forth in paragraph 6.**

7. **Case Dispositive Motions.** All case dispositive motions and an opening brief and affidavits, if any, in support of the motion shall be served and filed on or before October 16, 2008 or on or before two weeks after the Court issues an order stating that such motions are permissible, which ever is later. Briefing will be presented pursuant to the Court's Local Rules, unless the parties agree to an alternative briefing schedule. Any such agreement shall be in writing and filed with the Court for the Court's approval. Any request for extensions of time as set forth in this Scheduling Order **must** be accompanied by an explanation or your request will be denied. Opening and responsive briefs may not exceed twenty (20) pages and reply briefs shall not exceed ten (10) pages.

8. **Applications by Motion.** Except as provided in this Scheduling Order or for matters relating to scheduling, any application to the Court shall be by written motion filed, via electronic means (CM/ECF). Unless otherwise requested by the Court, counsel shall **not** deliver copies of papers or correspondence to chambers. Any non-dispositive motion should contain the statement required by Local Rule 7.1.1.

9. **Oral Argument.** If the Court believes that oral argument is necessary, the Court will schedule a hearing pursuant to District of Delaware Local Rule 7.1.4.

10. **Daubert Issues.** The Court will address Daubert issues at the Pretrial Conference. Daubert issues are properly raised as a Motion *in Limine* (to be submitted in accordance with the Motion *in Limine* schedule) and will count toward the five (5) permitted motions. (*see* ¶ 12).

11. **Pretrial Conference.** On February 18, 2009, beginning at 9:30 a.m., the Court will hold a Pretrial Conference in chambers with counsel. Unless otherwise ordered by the Court, the parties should assume that filing the Joint Pretrial Order satisfies the pretrial disclosure requirement in Federal Rule of Civil Procedure 26(a)(3). A sample form of Pretrial Order can be located on this Court's website at [www.ded.uscourts.gov](http://www.ded.uscourts.gov). Thirty (30) days before the Joint Proposed Pretrial Order is due, Plaintiff's counsel shall forward to Defendants' counsel a draft of the pretrial order containing the information Plaintiff proposes to include in the draft. Defendants' counsel shall, in turn, provide to Plaintiff's counsel any comments on the Plaintiff's draft as well as the information Defendants propose to include in the proposed pretrial order.

12. **Motions in limine:** The Plaintiff, California Defendants and Delaware Defendants shall file no more than five (5) motions *in limine* each. Briefs (**opening, answering, and reply**) on all motions *in limine* shall be filed by January 27, 2009. Opening and answering briefs shall not exceed five (5) pages and reply briefs shall not exceed three (3) pages. The parties shall file

with the court the **joint** proposed final pretrial order with the information required by the form of Final Pretrial Order, which can be located on this Court's website at [www.ded.uscourts.gov](http://www.ded.uscourts.gov) on or before January 27, 2009.

13. **Trial**. This matter is scheduled for an eight day bench trial beginning at 9:00 a.m. on March 9, 2009.

14. **Scheduling**: The parties shall contact chambers, at (302) 573-6470, only in situations where scheduling relief is sought, and only then when ALL participating counsel is on the line for purposes of selecting a new date.

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UNITED STATES DISTRICT JUDGE  
Gregory M. Sleet